



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & KOOME, JJ.A

CIVIL APPEAL (APPLICATION) NO. 246 OF 2015

BETWEEN

HUMPHREY NYAGOE MAKORI.....APPELLANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(An Application for leave to file Amended Memorandum of Appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (Mbaru, J) delivered on 10th April, 2013

in

ELRC Misc. Appl. No. 6 of 2012)

RULING OF THE COURT

Humphrey Nyagoe Makori (the applicant), moved to the Employment and Labour Relations Court (ELRC), then the Industrial Court of Kenya, by way of notice of motion dated 3rd May 2012, seeking in the main leave to file his claim against **Kenya Airports Authority** (the respondent) out of time.

The explanation proffered for the delay in filing the claim was *inter alia*, that the applicant was “restrained from any vigorous and outdoor activities that may worsen his health by his doctors due to his hypersensitive and diabetic condition and by the time the applicant was allowed to undertake such outdoor activities the prescribed time of filing the claim has (sic) already lapsed”.

The application was opposed by the respondent which was of the view that no satisfactory reason had been advanced for the delay, and further, even assuming that the applicant was indisposed, he could still have instructed his counsel to file the suit on his behalf. The application was canvassed before **M. W. Mbaru J.**, who in a Ruling rendered on 10th April, 2013, dismissed the application, after finding it devoid of merit.

It is instructive to note that a Notice of Appeal expressing intent to challenge, what we assume is that Ruling was filed before the Industrial Court on 23rd July, 2013, more than three months after the said Ruling. There is no indication in the Record of Appeal to show that leave to file an appeal out of time was ever sought and granted before the Notice of Appeal in question was filed before this Court. We need not

say more on that issue because that goes into the competence of the appeal itself, which is not what is before us. It is nonetheless important as it impacts on the application before us in regard to learned counsel for the applicant's conduct in the present application.

When the appeal went for case management, it was directed that the appeal would be canvassed by way of written submissions, and directions on the filing of the submissions were duly given. The appeal was also given a hearing date. When the appeal came up for hearing on 15th February, 2017, the Court observed that both the Notice of Appeal and the Memorandum of Appeal and the entire record as it stood, addressed a judgment delivered on 10th April, 2013 by Honourable Justice Nduma Nderi, and alerted learned counsel about that apparent anomaly. Ms. Mwai, learned counsel then appearing for the appellant requested for time to enable her rectify the record of appeal. She was granted 21 days within which to rectify the record.

Instead of complying with that order of the of the Court, counsel for the appellant filed a Notice of Motion on 8th May, 2017, almost two and a half months later, without leave of the Court, or extension of the 21 days which had long expired. That is the application that came up for hearing on 5th June, 2017, which is the subject of this Ruling.

The application is pronounced to be premised on “*Section 44(1) of the Appellant (sic) Jurisdiction Act, and all other enabling provisions of the law*”. From the onset, we note that there is no **Section 44(1)** in the Appellate Jurisdiction Act, which we believe is what the applicant was referring to when she wrote “*Appellant Jurisdiction Act*”. No attempt whatsoever was made to correct this even as counsel prosecuted this application before us. We are willing to overlook that issue so that we can consider the application on its merit, and assume that it is predicated on **Rule 44(1) of the Rules of this Court**.

The application carries two prayers on its face; one is the prayer for leave to file an amended memorandum of appeal; and the second is for leave to file submissions.

The applicant, both on the grounds on the face of the application and in the affidavit in support, states that the application was filed pursuant to the leave of the court granted on 22nd February, 2017, yet our record shows that the leave in question was granted on 15th February, 2017.

The application does not seek to amend the Notice of Appeal, which refers to Hon. Nduma Nderi J, as the Judge who made the impugned Ruling. When asked by the Court how counsel would remedy the situation by seeking to amend only the Memorandum of Appeal and leave it riding on a defective Notice of Appeal, no credible answer was forthcoming.

We heard learned counsel on her application, which was opposed by Ms. Oyombe, learned counsel for the respondent on points of law. According to Ms. Oyombe, the application was bad in law having been filed outside the 21 days given by the Court. She urged us to find that the leave granted had been exhausted even as at the time the application was filed, and the same ought therefore to be dismissed. She called in aid **Rule 44(2) of the Court of Appeal Rules**.

In a brief reply, Ms. Maina stated that she was relying on **Article 159(2) of the Constitution** as a cure for all the mistakes she had made in her application. She offered the Court no explanation whatsoever as to why the application in question was not filed within the 21 days given by the Court; nor did she ask the Court to extend the said leave. She was also mum on the provisions of **Rule 44(2) of the Rules of this Court**.

We find it necessary to cite the said Rule for ease of reference by counsel for the applicant. The same provides as follows:-

“44 (1) ...

(2) *Where the court gives leave for the amendment of any document, whether on a formal or an*

informal application; the amendment shall be made or an amended version of the document be lodged within such time as the Court when given leave may specify, and if no time is so specified, then within forty eight hours of the giving of leave, and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.”

This provision is self-explanatory and cannot be wished away, or even obscured under the heavy cloak of **Article 159(2) of the Constitution of Kenya**, or the overriding objective (the Oxygen Rule) encapsulated in **Section 3A and 3B of the Appellate Court Jurisdiction Act**.

Even on that one ground, the application before us is incurably bad in law and is for dismissal, it having been filed long after the extension of time given by the Court, and without leave.

We cannot go without saying that, even as counsel prosecuted the application, no extension of time for the said leave was even requested for. In our view, learned counsel for the applicant dealt with this matter inexcusably casually, not to mention that the application itself was slovenly drawn. The issue of statutory timelines, has been variously discussed by this Court through a myriad of decisions, and we do not find it necessary to belabour it for purposes of this Ruling, Suffice it to say that, where as in this case the leave was granted by the Court, the Court could under **Rule 4 of this Court’s Rules** be moved to extend time. That was not done. That cannot be remedied by **Article 159(2) of the Constitution** as it is not a procedural technicality whatsoever. It is a flagrant breach of **Rule 42(2) of the Rules of this Court**.

This Court has severally stated that **Article 159(2) of the Constitution** is not a panacea for all deficiencies in observance of laid down procedures, nor was it meant to throw all the Rules of procedure out through the window. It cannot be used by counsel as a shortcut or a cover for ineptness, or dereliction of duty. Simply put, it cannot aid counsel in this case. (See **Hunker Trading Company Ltd Vs Elf Oil Kenya Ltd, Civil Appeal No. Nai 6 of 2010.**), where this Court reiterated the need to guard against arbitrariness and uncertainty when applying the **O2** principle and insisted that Rules and precedents that are **O2** compliant must be followed in order to maintain certainty and consistency, lest the principle turns into a unruly horse which the courts will not be able to contain. We note that in this case, learned counsel had not even realised that her application was fatally defective and it took the Court’s initiative to bring that fact to her attention and even advise her on what she needed to do and gave her leave to do so. Instead of complying with those simple and straightforward instructions, counsel allowed the leave to lapse, and filed a totally incompetent application. She cannot find shelter under the umbrella of **Article 159 (2)** of the Constitution or the overriding principle.

Secondly, for the sake of argument, even supposing that the application, as is, was filed within the timelines granted by the Court, how would the issue of not applying to amend the Notice of Appeal be remedied? A defective Notice of Appeal cannot carry a valid Memorandum of Appeal, particularly because this Court draws its jurisdiction, in hearing and determining applications from the Notice of Appeal and not from the Memorandum of appeal.

Whichever way one may look at this application, however sympathetic we would like to be towards the applicant, the application is simply not sustainable. For the foregoing reasons, we find the application before us totally devoid of merit, and dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 21st day of July, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR